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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-368

JOE I. TORRES,

Petitioner

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

HOW FEDERAL QUESTION WAS RAISED 4

ARGUMENT 4

CONCLUSION 9

INDEX TO APPENDICES

APPENDIX A –
JUDGMENT AND OPINION OF THE COURT OF APPEALS, STATE OF COLORADO A-1

APPENDIX B –
ORDER OF SUPREME COURT OF STATE OF COLORADO DENYING WRIT OF CERTIORARI B-1

APPENDIX C –
CONSTITUTIONAL PROVISIONS INVOLVED, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION C-1

APPENDIX D –
PORTION OF TRIAL TRANSCRIPT WHERE THE FEDERAL QUESTION WAS FIRST RAISED D-1

APPENDIX E –
FINAL ORDER AND JUDGMENT OF THE DISTRICT COURT FOR THE COUNTY OF JEFFERSON, STATE OF COLORADO E-1

APPENDIX F –
ORDER GRANTING SEVERANCE OF TRIALS OF ALLEGED CO-CONSPIRATORS F-1

APPENDIX G –
PORTION OF TRANSCRIPT OF CASE OF ALLEGED CO-CONSPIRATOR, CASE NO. 65513, DIV. C, DISTRICT COURT, PUEBLO COUNTY, COLORADO G-1

TABLE OF CITATIONS

Cases:

Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L. Ed. 2d 314 8

Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L. Ed. 2d 213 (1970) 4, 5, 6, 7, 8, 9

Maddox v. U.S., 146 U.S. 140, 13 S.Ct. 50, 36 L. Ed. 1917 7

People v. Braly, 532 P.2d 325 (Colo. 1975) 5

Statutes:

Colorado Revised Statutes (1963) as amended 40-5-2 2

Colorado Revised Statutes (1963) as amended 40-7-35 2

28 U.S.C.A. 1257(3) 2

Constitution of the United States of America, Amendments:
SIX 2, 4, 5, 6, 7, 9
FOURTEEN 2, 4, 5, 6, 7, 8, 9

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In the
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OCTOBER TERM, 1975

No. _____

JOE I. TORRES,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

The Petitioner, Joe I. Torres, respectfully prays that a Writ of Certiorari be issued to review the Judgment and Order of the Court of Appeals of the State of Colorado decided April 22, 1975. Certiorari denied by Colorado Supreme Court July 7, 1975.

OPINION BELOW

The Judgment and Order of the Court of Appeals of the State of Colorado is reported as the People of the State of Colorado, Plaintiff-Appellee, vs. Joe I. Torres, Defendant--Appellant, No. 74-268. A copy of the Opinion is attached hereto as Appendix A.

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JURISDICTION

This criminal action was instituted by the State of Colorado in the District Court of Pueblo County, Colorado, accusing JOE I. TORRES of violating Colorado Revised Statutes 1963 as amended, §40-5-2, Theft, and §40-7-35, Conspiracy. Venue was later changed to Jefferson County, Colorado. A jury returned a verdict of guilty and Judgment was entered on that verdict June 25, 1974 (Appendix E), which was affirmed by the Colorado Court of Appeals on April 22, 1975 (Appendix A). Pursuant to the applicable Colorado Rules of Criminal Procedure, a Petition for Writ of Certiorari was denied by the Colorado Supreme Court on July 7, 1975 (Appendix B). This Petition for Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

May the State of Colorado enter into an overt agreement not to call a "crucial" or "devastating witness" in a criminal case and thus deny to the defendant his rights under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Particularly, where the witness not called would be comparable to the "only eye witness".

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portions of the Sixth and Fourteenth Amendments to the United States Constitution appear in Appendix C attached hereto.

STATEMENT OF THE CASE

The Petitioner, Joe I. Torres, was tried upon indictment charging him with Theft over One Hundred Dollars ($100.00) as defined by 40-5-2, C.R.S. 1963, as amended, and Conspiracy as defined by 40-7-35, C.R.S. 1963, as amended.

The substance of the prosecution's case was (1) that Joe I. Torres authorized payment for gasoline billed but not delivered to the Pueblo County Sheriff's Department of the State of Colorado, (2) that the County of Pueblo, State of Colorado made payments to an oil company, doing business in the County of Pueblo, because of the signature of the Petitioner Joe I. Torres, on the requisition, (3) that a co-conspirator had paid to the Petitioner monies for his cooperation in the scheme to defraud the County of Pueblo. The co-conspirator was a partner in the oil company and one of its regular customers was the Pueblo County Sheriff's Department. Certain memoranda and records of the co-conspirator were seized from the business premises of the oil company, pursuant to a search warrant. The validity of this search warrant is not in issue. These records and personal memoranda of the co-conspirator were admitted at the trial of the Petitioner, Joe I. Torres, in the attempt to prove the alleged conspiracy and the theft. The Co-conspirator had, prior to this trial, pled guilty and could not therefore, invoke the privilege against self incrimination. The co-conspirator was not called to testify for the prosecution as to these exhibits, memoranda, or business records.

The evidence in the trial reflected, without question, that all the personal memoranda and business records were made by the alleged co-conspirator.

In lieu of calling the co-conspirator, a certified public accountant was called to testify as to the meaning of the memoranda and records and their interrelation with other documentary evidence. The alleged co-conspirator, who was available for trial and readily available for subpoena by the State, was not called because of a previous agreement that the State had made with the co-conspirator that he would not be called as a witness.

Thus, the principal evidence of the conspiracy and the alleged theft was evidence which rested on hearsay document whose meaning and interpretation was given to the Court and jury by a person whose testimony was admitted presumably as an expert and who was allowed to testify as to hearsay

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documents under the principal that the memoranda and records seized under the search warrant were hearsay statements made in furtherance of an alleged conspiracy.

The Petitioner, Joe I. Torres, was found guilty by the jury and the verdict was affirmed by the Court of Appeals (Appendix A). The Colorado Supreme Court denied Certiorari.

HOW FEDERAL QUESTION WAS RAISED

At the trial, Petitioner objected to the introduction of alleged "pay-off" or personal notes of the alleged co-conspirator on the grounds: that they were irrelevant to this Petitioner; that they were hearsay not within the co-conspirator exception to the hearsay rule; that the introduction of the documents without the author present to testify as to their meaning would be a denial of Petitioner's right to confrontation and right of cross examination since these documents were obviously very crucial and devastating to the case (citing *Dutton vs. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L. Ed. 2d 213 (1970)); that testimony of an expert as to their meaning was not the best evidence, that the best evidence would be the testimony of the alleged co-conspirator. Folio 1548-1549 (Appendix D). The trial court overruled this objection.

The question was again raised in the Motion for New Trial (F. 731-733, p. 283), and the Motion was denied.

A timely and proper appeal was made to the Colorado Court of Appeals, wherein this question was again raised in Argument #2, page 3 of the Petitioner's Brief in the Colorado Court of Appeals.

A timely and proper Petition for Writ of Certiorari was filed in the Supreme Court of Colorado, wherein this question was again raised. Said Petition was subsequently denied.

ARGUMENT

Your Petitioner respectfully contends that his right to confrontation of witnesses secured by the Sixth and

Fourteenth Amendments was denied to him by overt action by the State of Colorado. The State of Colorado entered into an express agreement with co-defendant, an alleged co-conspirator, not to call said co-conspirator to testify at the trial of Petitioner. That this is not just a question of whether or not hearsay evidence admitted under an approved exception violates the Constitutional rights of the Petitioner, but rather, this is a case where the agreement of the State of Colorado with a witness strikes at the heart of the protection afforded by the Confrontation Clause of the Sixth and Due Process Clause of the Fourteenth Amendments of the United Stated Constitution.

Petitioner does not contend in this brief that the State of Colorado may not, by judicial decision, authorize the admission of hearsay statements which are made in the course of and furtherance of a conspiracy. (*People vs. Braly*, Colo., 532 P. 2d 325 (1975)

The basis of the decision of the Court of Appeals of Colorado in its Opinion (Appendix A) was stated as follows:

> The majority and concurring opinions in *Dutton vs. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L. Ed. 2d 213, are dispositive of this issue. (Referring to the question as to whether or not the Petitioner was denied his Sixth Amendment right to be confronted by witnesses and cross-examine said witness.

Because the Court of Appeals felt that the *Dutton vs. Evans*, case disposed of Petitioner's contention, an examination of this case is imperative.

A recitation of the facts of the Petitioner's case briefly in this Argument is necessary. Petitioner was originally charged as a co-conspirator with Theft and Conspiracy to Commit Theft. The case of the co-conspirator was severed and separate trials ordered (Appendix F). As part of the disposition and plea bargaining in the co-conspirator's case, the co-conspirator was granted, by the Attorney General of

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the State of Colorado, immunity from subpoena and immunity from being called by the People to testify in the later trial of the Petitioner (Appendix G).

In the trial of the Petitioner, this bargain and arrangement was honored and the co-conspirator was not called as a witness.

The only direct evidentiary link between the alleged conspirator and the Petitioner was hand written notes made by the co-conspirator, which hand written notes had been seized from the premises of the co-conspirator under authority of a search warrant. These notes may or may not have implicated the Petitioner, depending on their interpretation and the identification of certain initials written by the co-conspirator next to the alleged "pay-off" amounts. In lieu of calling the co-conspirator, the State of Colorado chose as its witness, a certified public accountant who testified as to his interpretation of the hand written notes seized by the State. Though the Petitioner did have the right to cross-examine this certified public accountant, Petitioner contends that the failure of the State to call the co-conspirator, the man who had made these notes as a witness, denied him his rights under the Confrontation Clause of the Sixth and Due Process Clause of the Fourteenth Amendments.

The distinction between the *Dutton* case and Petitioner's fact situation is clear and unmistakable. In the *Dutton* case, there was no overt agreement between the witness and the State. Petitioner does not contend that the State may not, as part of its plea bargaining, enter into an agreement with an alleged co-conspirator that he will not be called as a witness. In the case of a co-defendant, this may be proper. But with respect to the Petitioner in this case, this agreement deprives him of his Constitutional right to be confronted by witnesses and the opportunity to cross-examine.

Further, the exclusion of said testimony of the co-conspirator by overt agreement denied to the Petitioner an essential fair trial as guaranteed by the Fourteenth Amendment.

Further distinction should be made between Petitioner's case and the case of *Dutton vs. Evans*, which was relied on by the Court of Appeals of Colorado. In the *Dutton* case, the State granted immunity to the principal witness in return for his testimony. In the Colorado case, the State simply entered into a plea bargaining agreement whereby the co-conspirator was promised immunity from subpoena and would not be called to testify.

Further, in the *Dutton* case, the State had as its principal witness an eyewitness who testified, subject to full cross-examination, about the facts concerning the death of three Georgia police officers. In addition to this eyewitness, nineteen other witnesses testified for the prosecution and defense counsel was given full opportunity to cross-examine each witness and exercised that opportunity with respect to most of them. (Page 214, *Dutton* Decision)

The witness who was not called in *Dutton* was described by the Supreme Court as being a peripheral witness. His testimony, concluded the Court in a concurring Opinion, could easily have been deemed prejudicial to the State because of the circumstances surrounding it. Justice Blackmun, with Chief Justice Burger concurring, felt that the error, if there be an error, in failing to call this peripheral witness would be, in light of the entire record, "harmless error." This Court recognized that "The Sixth Amendment right of an accused to confront the witnesses against him is . . . a fundamental right . . . made obligatory on the State by the Fourteenth Amendment." *Dutton vs. Evans, supra.*

This Petitioner does not deny the right of a State to introduce certain evidence as an exception to the hearsay rule and there are, admittedly, situations where the admission of a hearsay statement would not, in and of itself, violate the Constitutional Rights as afforded to an accused by the Sixth and Fourteenth Amendments. (See *Maddox vs. The United States,* 146 U.S. 140, 151, 13 S.Ct. 50, 53, 36 L. Ed. 1917 (a dying declaration) and see other cases cited at pages 79, 80 of *Dutton vs. Evans*).

It is the position of the Petitioner that the State of Colorado violates his Constitutional rights under the Sixth and

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Fourteenth Amendments, when it enters into an overt agreement with an alleged co-conspirator rendering it impossible for the State to call said co-conspirator as a witness; and thus, making it obligatory to invoke the exception to the hearsay rule. This is particularly critical when the witness so excluded by agreement is the *only* witness who in any way could have established the evidentiary connection between the alleged conspiracy and theft and the Petitioner.

What further distinguishes the Petitioner's case from that of *Dutton vs. Evans*, is the fact that whereas the principal witness, a co-conspirator and previously a co-defendant, who wrote the documents was not called to testify, in his place a certified public accountant, a man of considerable education and prestige, was called as a witness to interpret the documents and relate their meaning as he saw it to the Court and jury. This interpretation by a certified public accountant, called as an expert witness by the State under the hearsay exception, lent force and dignity to the documents and credibility which reasonably would not have been forthcoming from an alleged co-conspirator's testimony. This amounted to creating, in the law, a concept one might label "expert hearsay." Unlike the *Dutton vs. Evans* case, this Petitioner's case involves evidence which in every sense must be labeled "crucial" or "devastating." Without the opinions of the certified public accountant, the charges against the accused would have failed.

As in the case of *Brookhart vs. Janis*, 384 U.S. 1, 86, S.Ct. 1245, 16 L. Ed. 2d 314, the Petitioner's case involved the wholesale denial of cross-examination. Unlike the case of *Dutton vs. Evans*, where the Court noted that the testimony admitted by hearsay exception was of "peripheral significance," the testimony received in the Petitioner's case under the exception to the hearsay rule went to the core of the case, was fundamental, and without it the case could not have been by any measure sustained.

The finding in *Dutton vs. Evans* is a limited finding based upon the particular facts of that case and as stated on pages 88, 89:

> The Georgia statute can obviously have many applications consistent with the Confrontation

Clause, and we conclude that its application in the circumstances of this case did not violate the Constitution.

Thus, the *Dutton* case may be cited for the general proposition that under the facts of that case there appeared no violation of the accused's rights under the Sixth and Fourteenth Amendments, but it cannot be argued, as the Colorado Court of Appeals did, that it was dispositive of Petitioner's contention that he was denied his Constitutional rights as set forth in this Argument.

CONCLUSION

An expert witness who is called upon to interpret notes written by a non-appearing co-conspirator does not afford an accused the same right of cross-examination as if the co-conspirator had been called.

It is, therefore, respectfully submitted that the Petitioner's Constitutional rights as provided by the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment have been violated by the overt, express agreement of the State of Colorado through its duly elected Attorney General. The conviction in the trial court, which was affirmed by the Court of Appeals, and to which Certiorari was denied by the Colorado Supreme Court, should be overturned and the conviction reversed.

Respectfully Submitted,

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APPENDIX A

COLORADO COURT OF APPEALS

No. 74-268

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JOE I. TORRES,

Defendant-Appellant,

Appeal from the District Court of Jefferson County

Honorable George G. Priest, Judge

DIVISION I — JUDGMENT AFFIRMED

Silverstein, C.J., Coyte, and Van Cise, JJ.

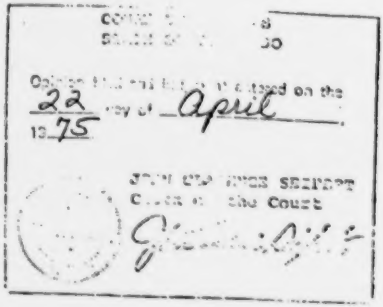
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Opinion by JUDGE VAN CISE



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The defendant, Joe I. Torres, then Sheriff of Pueblo County (the County), was indicted as a co-defendant with John J. Tucci, president of the Main Oil Company (Main Oil), for theft from the County in an amount over $100 (1967 Perm. Supp., C.R.S. 1963, 40-5-2) and for conspiracy to commit theft (C.R.S. 1963, 40-7-35). Trial of the defendants was severed and the case as to Tucci was resolved by plea negotiation. Torres was tried in the Jefferson County District Court and, in that trial, the jury returned a verdict of guilty as to each charge. The issues in this appeal are directed to various rulings of the trial court concerning the admissibility of expert testimony and other evidence and the propriety of certain instructions given to the jury. We affirm.

The theory of the prosecution's case was that Torres authorized payment for, and signed receipts for, gasoline and automobile maintenance supplies billed but not delivered to the Pueblo County Sheriff's Department by ~~Main~~ Oil; that payment to Main Oil was made by the County on the basis of Torres's signature; and that Tucci paid Torres for his cooperation in the scheme. The evidence consisted mainly of records from the offices of the Pueblo County Commissioners, records and papers of Main Oil and Tucci relating to the transactions with the Sheriff's Department, oral testimony of people employed by the Sheriff's Department or by Main Oil, and expert testimony of an accountant who had examined the exhibits and who linked them to dealings between Main Oil and the Sheriff's Department and between Tucci and Torres. The Main Oil and Tucci documents were obtained pursuant to a search warrant,

the propriety of which is not at issue here. Tucci was not called as a witness by either side. Torres, testifying in his own behalf, stated that the signing of vouchers was a normal everyday function in his office, that the vouchers for gasoline were not handled any differently than any other vouchers, that he never saw the documents found in Tucci's office, and that he never discussed any scheme with Tucci to defraud the County through false gasoline purchases and sales.

I.

Personal notes and memoranda of co-defendant Tucci and Main Oil petroleum product sales tickets in the handwriting of Tucci, all of which had been obtained from Tucci's desk at Main Oil, were introduced against Torres under the co-conspirator exception to the hearsay rule. By that exception, oral or written out-of-court statements made by one co-conspirator are admissible against the others on the theory that the statements of one become the statements of all if done during the course of, and in the furtherance of, the conspiracy. People v. Braly, ____ Colo. ____, 532 P.2d 325; see People v. Schlepp, ____ Colo. ____, 518 P.2d 824.

Torres contends there was no evidence, other than the hearsay documents objected to, which established a conspiracy between Tucci and Torres. Thus, he argues that the hearsay rule exception was inapplicable here and that the admission of these exhibits was reversible error. He is correct that, as a condition precedent to the receipt of these documents to prove the truth of the assertions therein, the prosecution must produce other evidence of a conspiracy, either direct or circumstantial. People v. Braly,

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supra; People v. Schlepp, supra. However, in this case, the requisite evidence was already in the record at the time the documents were introduced.

A Main Oil bookkeeper had already testified that, in her handling of the daily recapitulations of cash transactions and posting to charge accounts, she had noticed that the names on checks were occasionally unrelated to the cash slips accompanying the checks or to the accounts to which the payments were to be credited, and that checks with cash slips occasionally predated the transactions shown. Although all cash and cash sales slips were turned into the office at the end of each day, and not totalled or balanced until the next morning, the bookkeeper had a rough idea of how much cash was received on a given day. There was less cash in the cash box on some mornings than there had been the previous nights. On some occasions, checks arriving in one day's mail as payments on account would reappear in the balancing of the cash box several days later as payments on other accounts. The bookkeeper was usually the last employee to leave at night and the first to arrive in the morning. However, Tucci lived in the Main Oil building, his apartment opened into the office, he had access to the cash box at night, and he was usually in the building when she arrived at work in the morning. This evidence supports an inference that Tucci was manipulating Main Oil's cash transactions for some purpose.

The bookkeeper also testified that the Sheriff's Department purchased its supplies from Main Oil on credit, and that, in contrast to the processing of all other Main Oil credit sales in

which the delivering driver turned in the customer-signed invoices directly to the bookkeepers, Tucci, who never made deliveries, handled the Sheriff's Department invoices personally. The bookkeeper frequently saw unsigned invoices representing sales to the Sheriff's Department on Tucci's desk in his office, but when Tucci delivered these invoices to the bookkeepers, these invoices bore the signature of Torres, which signature had been identified by other witnesses. She never mailed or personally delivered invoices to Torres for his signature, nor had she ever seen Torres at the Main Oil office. The personal memoranda, the admissibility of which Torres challenges here, were in Tucci's handwriting and she had seen them in Tucci's desk.

There was also evidence that on an average of every 30 days, Main Oil refilled a 500 gallon gasoline tank which it had originally installed at the home of a deputy sheriff in Boone, Colorado, at the request of Torres. The deputy, who used this gasoline in his patrol car, had the only key to the tank outlet. He was never asked to receipt for, to keep records on, or to verify invoices relating to these gasoline deliveries.

Testimony had established that county suppliers are paid by warrants based on requisitions and vouchers signed by the department head or by the department purchasing officer, and that the Sheriff's Department had authority to select its own gasoline supplier. In evidence were several county warrants payable to and cashed by Main Oil, together with supporting requisitions and vouchers signed by Torres, including two warrants based on four alleged 800 gallon deliveries and one 700 gallon delivery to the

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500 gallon tank, and others showing an aggregate of 2100 gallons allegedly delivered to that same tank in one 45 day period.

This evidence is sufficient to show the prima facie existence of a conspiracy and of Torres's participation therein, at least for the purpose of admitting evidence under the co-conspirator exception to the hearsay rule. It is not necessary to prove that co-conspirators came together and actually agreed in terms to have a common design and to pursue it by common means. If it is shown by their acts that they pursued the same object, one performing one part and the other another part, a conspiracy has been established. Smaldone v. People, 103 Colo. 498, 88 P.2d 103. An agreement need not be proved directly to establish a conspiracy. La Vielle v. People, 113 Colo. 277, 157 P.2d 621. As conspiracies are generally covert, most often they are established by circumstantial evidence. Medina v. People, 154 Colo. 4, 387 P.2d 733. Tucci's hearsay statements were properly admitted under the exception to the rule.

Torres's contention that there was no showing that the challenged documents were made during or in furtherance of the conspiracy is not well founded. Most of the entries in the documents bear dates after the July 7, 1970, date specified in the indictment for the commencement of the conspiracy, the earliest start in March and continue through the rest of 1970. All clearly tie into the pendency of the conspiracy as shown by other testimony. Other evidence also showed continuation of the active conspiracy beyond the February 10, 1971, date when the documents were obtained from Tucci's office.

II.

Torres urges, as an additional ground for reversal, that the admission of the Tucci documents and of expert testimony thereon denied him his Sixth Amendment right to confront witnesses against him. We do not agree.

In resolving this issue, the admission of the Tucci documents must be distinguished from the testimony of the expert witness interpreting them. In view of the extensive cross-examination of the expert at the trial, Torres was fully afforded his right to confront this witness. The person who did not appear to testify was Tucci. His only statements are in the documents which we hold were properly admitted under the co-conspirator exception to the hearsay rule. Thus the question is whether Torres was denied his Sixth Amendment right to cross-examine Tucci.

The majority and concurring opinions in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed 2d 213, are dispositive of this issue. In Dutton, the witness, a fellow prisoner of an alleged accomplice, testified for the prosecution about a statement made to him by this accomplice, who did not himself testify at defendant's murder trial. This hearsay statement was admitted in the state court under a statute allowing evidence of a co-conspirator's statement made even after the active stage of the conspiracy. The Supreme Court affirmed the state court, and held that the admission of the statement did not violate the Sixth Amendment confrontation clause and that defendant's right of confrontation was not otherwise violated. As stated in Gallegos v. People, 175 Colo. 553, 488 P.2d 887, "'[T]he right of confrontation may not be invoked to exclude evidence other-

wise admissible under well-established legitimate exceptions to the hearsay rule.'"

In reaching the conclusion in Dutton, supra, the Supreme Court noted that counsel for the defendant could have subpoenaed the alleged co-conspirator, but chose not to do so. The same could have been done here by Torres.

III.

Torres contends that the trial court improperly allowed an accountant to testify as an expert concerning his opinions and conclusions as to the meaning of the Main Oil and Tucci records and documents. The court permitted the accountant to collate and explain the meaning and interconnection of the various County, Sheriff's Department, Main Oil, and Tucci records and documents, and to give his opinion from them as to what they showed. All of the particular documents relating to the alleged theft had been admitted as exhibits, and the books of Main Oil had been produced and were available at the trial to be utilized for cross-examination if the defendant's attorneys saw fit.

Applicable here is the statement in Cliff v. People, 84 Colo. 254, 269 P. 907, with regard to the use of accounting experts in a similar case:

> "The books and other records were in evidence. The witnesses segregated from the mass of entries, and placed together in a group, certain entries that, in their opinion, bear a relation to one another, and they explained such relation from an expert accountant's standpoint. The fact that the entries are of such a character as to make it difficult to understand them - a situation by no means unusual when accounts are kept by or under the supervision of one who is embezzling - instead of operating to exclude expert testimony, is all the

> greater reason for giving to the jury the assistance afforded by the testimony of those who possess special skill in the matter of accounts."

See Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72; Bridges v. Lintz, 140 Colo. 582, 346 P.2d 571; National Fuel Co. v. McNulty, 65 Colo. 176, 177 P. 979.

Admission of expert testimony is within the sound discretion of the trial court. People v. Chavez, ____ Colo. ____, 511 P.2d 883; McCune v. People, 179 Colo. 262, 499 P.2d 1184; Bridges v. Lintz, supra. The credibility and weight to be given to the expert's testimony are jury questions, McCune v. People, supra, and the court properly instructed the jury in this respect. There was no abuse of discretion, and the testimony was properly admitted.

IV.

At the time the accounting witness was testifying, the prosecution offered, and the court admitted into evidence as exhibits, enlarged photographic copies of some of the exhibits which were already in evidence. Torres conceded that these were accurate reproductions of the originals. However, he objected to allowing the enlargements to be taken by the jury into the jury room during its deliberations at the conclusion of the case. He contended that these blow-ups unduly emphasized these particular exhibits.

Admitting enlargements of exhibits already in evidence is a matter within the discretion of the trial court. They may properly be received as visual aids to the jury to assist it in arriving at an understanding of the evidence. Republic National Life Insurance Co. v. Chilcoat, 368 P.2d 821 (Okla.); see Maynes v. People, 119 Colo. 149, 200 P.2d 915; Thomas v. State ex rel. Commissioners of

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Land Office, 197 Okla. 450, 172 P.2d 973; Sim v. Weeks, 7 Cal. App. 2d 28, 45 P.2d 350; and Annot., 72 A.L.R. 2d 308. Upon retiring for deliberation, the jury may take all exhibits which have been received in the case. Wilson v. People, 103 Colo. 150, 84 P.2d 463; see Crim. P. 57 and C.R.C.P. 47(m). There was no error here.

V.

Torres argues that the court erred in submitting an instruction to the jury that dealt merely with intent in general. He asserts that this instruction was inappropriate in connection with the crime of theft which includes specific intent as an essential element. However, that instruction was included with other general stock instructions and was not directed at any particular offense. The court gave another instruction dealing with the crime of theft, including the intent element, in the exact words of the theft statute. That instruction clearly spelled out the intent required to commit theft, and has been repeatedly upheld. Blincoe v. People, 178 Colo. 34, 494 P.2d 1285; Sandoval v. People, 176 Colo. 414, 490 P.2d 1298. There was no error in refusing to give defendant's tendered instruction on specific intent. People v. Gilmer, ____ Colo. ____, 511 P.2d 494. Also, the court gave an instruction on Torres's theory of the case, including his contention that he lacked knowledge and intent. See McCune v. People, supra.

No one of these instructions given was in conflict with or inconsistent with any other instruction. "Under the principle that the instructions in a case must be considered as a whole, the jury was properly informed as to the intent element." People v. Pool, ____ Colo. ____, 522 P.2d 102.

Judgment affirmed.

CHIEF JUDGE SILVERSTEIN and JUDGE COYTE concur.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. C-725 April Term, 1975

JOE I. TORRES,

Petitioner,

vs.

THE PEOPLE OF THE
STATE OF COLORADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

July 7 , 1975

By the Supreme Court
Sitting En Banc

Supreme Court
State of Colorado
Certified to be a full, true and correct copy
AUG 13 1975
[illegible] TURELLI
Court Clerk of the Supreme Court
Seal
By [illegible]
Deputy Clerk

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APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to ... be confronted with the witnesses against him; ... .

AMENDMENT XIV

... nor shall any state deprive any person of life, liberty or property without due process of law, ...

APPENDIX D

THE COURT: Well, go ahead and make your record.

MR. YOUNG: It should be "J" and "K".

THE COURT: Yes, go ahead and make all kinds of objections on those.

I told Mr. Young a little while ago not to object until they were offered, so this is the time to do it.

All right, go ahead, Mr. Young.

MR. YOUNG: Your Honor, as to Exhibits J and K, "J" being the alleged pay-off or personal notes of Mr. Tucci, we make the following objection: We object, first of all, as to their relevancy to this Defendant in this case. Second of all, we would object to these being admitted since they would constitute hearsay and do not fall, we believe, within the co-conspirator exception to the hearsay rule. We do not believe that a foundation was laid for their admission.

As the second basis, or I believe it would be the third basis, we would object on the basis that the introduction of these documents without Mr. Tucci to testify as to their meaning when they were made, as previously argued, this would be a denial of the right of confrontation, right of cross examination, since these obviously are very crucial and devastating to the case; and based on Dutton vs. Evans, cross examination should be allowed in crucial and devastating matters, your Honor.

We would also object to these on the basis of the best evidence rule. The testimony by an expert in this case as to the meaning of the documents definitely is not the best evidence. The best evidence in this case would be the meaning by Mr. Tucci.

The prosecution is not prepared to present Mr. Tucci to testify, and only he knows the meaning of this documents, and he definitely would be the one with the best knowledge of these.

Your Honor, again we would call to the Court's attention the argument previously made that Mr. Tucci is not being called by the prosecution and his entry of the plea which denies him this right, and therefore the prosecution could not call him.

For those reasons we object to Exhibits J and K, being the personal papers of Mr. Tucci.

THE COURT: All right. The objection will be overruled for the same reason that they were overruled yesterday, the fact that these documents appear to the Court to be written documents in furtherance of a conspiracy and therefore are proper documents to come before the perusal of the jury.

So, "J" and "K" will be admitted.

(Whereupon, People's Exhibits J and K were admitted in evidence.)

THE COURT: Now, as to the large ones, do you want to make an objection as to that?

MR. YOUNG: Yes, your Honor, as to the enlargements, we believe that the documents themselves have been introduced into evidence and they would be the best evidence available. We believe that the enlargements would call undue attention to certain facts in this case which could lead to influence upon the jury of a prejudicial nature. We believe that this also could be an evasion upon the province of the jury to have specific exhibits enlarged and then brought to their attention in that manner. We think the

APPENDIX E

IN THE DISTRICT COURT IN AND FOR THE 5
COUNTY OF JEFFERSON AND STATE OF COLORADO

S3 829

Crim. Action: 5989 Division

PEOPLE OF THE STATE OF COLORADO)
vs.)
)
Joe I. Torres) FINAL ORDER AND JUDGMENT
Defendant)

Indictment
Information filed on: March 31, 1971

Defendant entered plea of not guilty to count #1 and #2 of the information on date of:

Plea of the defendant accepted by the Court on:

Information amended on motion of the District Attorney to
on date of:.

Defendant entered plea of to count
of the information on date of:

Count dismissed upon motion of the District Attorney on date of:

After trial (~~to the Court~~)(to a jury), defendant:

Granted probation for a period of

To make restitution through

Sentenced to indeterminate not to exceed two years at Colorado State Penitentiary at Canon City, Colorado

Case dismissed upon motion of
on date of:

Other:

DONE AND DATED THIS 25 DAY OF June
19 74.

BY THE COURT:

Judge George G. Priest

State Penitentiary Mittimus issued 6/25/74
19, in compliance with the sentence of the Court.

IRA K. MOORE
Clerk of the District Court
By:
Deputy Clerk

THROUGH

POOR COPY

APPENDIX F

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF PUEBLO
STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff;	) CASE NO. 65513	DIV. C
v.	) ORDER	
JOHN J. TUCCI and JOE L. TORRES, Defendants.	)	

On April 6, 1972, the People filed a Motion for Severance under Rule 14. The motion was argued on April 20, 1972, and May 4, 1972. Both defendants opposed the motion, not upon any ground involving the merits of the motion. Their objection to a severance was based solely on the fact that the court had previously denied a similar motion filed by defendant, Torres. It is interesting to note that this earlier motion was opposed by the People. Thus the situation seems to be that each side wants a severance, but opposes any severance requested by the other side. Under such circumstances, the court is of the opinion that a severance should be granted.

It is, therefore, ordered that the Motion for Severance filed by the People be granted and that separate trials be had for each defendant.

DONE IN OPEN COURT this 19th day of May, 1972.

BY THE COURT:

Jack T. Searcy
JUDGE

cc: Attorney General
W. C. Kettelkamp, Jr.
Jay E. Flick
Levi Martinez
(Copies of the foregoing order were mailed May 19, 1972.)

BLEED

plea negotiations. Does that reflect our position, Mr. Miller?

MR. MILLER: Yes. I want to be clear on two points, your Honor. We have not anywhere waived any constitutional rights of Mr. Tucci. He will not testify in any case pending before this Court. I want the Court to be aware of this. We are not going to testify. We will not, if we are called as a witness, and we have been advised we will not. We will exercise our fifth amendment rights, and Mr. Tucci will not testify in this case, will not appear before a grand jury, and this is understood. It is not intended that he be used as state's evidence, your Honor, is what I am suggesting. He doesn't want to do this, has refused, will not testify. Knowing this, the Attorney General still agreed to this disposition, is that correct?

MR. DILL: That is correct. Obviously, I have no control whether or not the defense will subpoena him. Obviously, I can't make an agreement to keep him off the stand. My only agreement is he will not be used as part of the state's presentation of evidence and he will not be subpoenaed before a grand jury in order to present more evidence against the case against Mr. Torres.

MR. MILLER: We have no objection to this, and we will make no statements in terms of minimization, but the agreement is that the Court has agreed to this plea bargaining to whatever the evidence shows, and

THROUGH

I disclosed to the Judge--I am not holding anything back--about his past record. There is one felony conviction, no other violations, and for which felony conviction, he could have taken a presidential pardon which have been issued by the thousands to this kind of offense, anywhere along the line. He didn't apply for it. That he will be granted probation on his record, now, this is where--

THE COURT: What you are interested in having here is whether probation will be for one or five years?

MR. MILLER: That is correct. Because of his age, we would like the lesser term and the Attorney General would like the greater term.

THE COURT: Well, that is all right with me providing that the presentence information, when we get that far, comports with what you have said.

MR. DILL: Your Honor, with the Court's permission, I have verified everything that Mr. Miller has said regarding his past record. I have nothing to indicate through my investigation that that is not the case. Obviously, our agreement is subject to anything coming up on the presentence report, but I have satisfied myself personally before I represent this to the Court.

THE COURT: So the agreement is very likely to go through?

MR. DILL: Hopefully, yes, sir. Now, we have motions set today. It is my understanding that we will not hear those motions, and that in the event there is a plea by Mr. Torres, we could take Mr. Tucci's plea at the same

SUPREME COURT, U.S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-368

JOE I. TORRES,
Petitioner,

vs.

THE PEOPLE OF THE
STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF COLORADO

BRIEF IN OPPOSITION

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INDEX

	Page
INTRODUCTORY STATEMENT	1
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	7
CONCLUSION	9

CASES

	Page
California v. Green, 399 U.S. 149 (1970)	7
Dutton v. Evans, 400 U.S. 74 (1970)	7, 8, 9
Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1917)	8
Holland v. United States, 348 U.S. 121 (1954)	7
Krulewitch v. United States, 336 U.S. 440 (1949)	8
People v. Braly, 532 P.2d 325 (Colo. 1975)	7
People v. Schlepp, 518 P.2d 824 (Colo. 1974)	7
People v. Torres, 536 P.2d 868 (Colo. App. 1975)	7
United States v. Baxter, 492 F.2d 150 (9th Cir. 1973)	9
United States v. Talbot, 470 F.2d 158 (6th Cir. 1972)	8

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BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The respondent accepts the petitioner's references and statement as to jurisdiction and the constitutional provisions involved. However, the factual context of this case mandates a restatement of the question presented.

QUESTION PRESENTED

Does the Federal Constitution absolutely prohibit the hearsay evidentiary use of a coconspirator's notes and records of fraudulent transactions, made during the pendency of a conspiracy, when there is abundant and independent circumstantial evidence of the defendant's guilt of conspiracy and theft?

STATEMENT OF THE CASE

The petitioner, at the time of the offense, was the sheriff of Pueblo County, Colorado. At the time of his ascendency to office, he elected to continue purchasing all petroleum products from John Tucci, president and operator of the Main Oil Company. During the year 1970, it became patently obvious that Main Oil Company was defrauding Pueblo County by continually billing, and receiving payment for, petroleum products that were charged to the Sheriff's Department account, but were never delivered.

The prosecution introduced Pueblo County documents which established monetary payments made by the County to the Main Oil Company from May 28, 1970, until February 11, 1971. The Pueblo County clerk authenticated these documents and explained that they each contained a cancelled warrant from the County to Main Oil, a requisition for payment from the Sheriff's Department to the County Commissioners, and invoices reflecting each delivery. It was from scrutiny of these invoices and from scrutiny of the operational needs of the Sheriff's office (revealed from other evidence) that extensive overbillings were revealed. Primarily, these records showed grossly disproportionate gasoline deliveries to the main dispensing gasoline tank used by the Sheriff's Department in downtown Pueblo. They also showed impossibly high deliveries to an auxiliary tank used by a single sheriff's deputy in Boone, Colorado.

As to the main tank, the Pueblo County records showed that over 7,000 gallons of gasoline were billed to the Sheriff's Department during May of 1970. The records revealed that this was 2,500 gallons more than the average used during the immediately preceding and following months. This was also four times the amount delivered in

August of the same year when, coincidentally, a Pueblo newspaper article reported the preceding months' disparate and exceedingly high usage. It was independently established (and the petitioner admitted) that the same number of vehicles (usually six) had access to this pump during this block of time and that gasoline usage would be fairly constant. When asked for an explanation of the unusually high May deliveries on cross-examination, the petitioner conceded that the County was charged for gasoline that was not in fact delivered.

The falsification of billings relating to the subsidiary tank in Boone, Colorado, was even more obvious and detectable. The tank was exclusively used by a single Pueblo County Sheriff's deputy. His testimony revealed that he would use about 450 gallons of gasoline a month. Since the tank held 500 gallons, he would order it filled about once each month. The Pueblo County records revealed, however, that the County was billed, and paid for, four deliveries of 800 gallons and one delivery of 700 gallons between July and November of 1970. That tank could not hold these amounts. The Pueblo County records also revealed that the County was billed, and paid Main Oil, for 1,900 gallons of gas, delivered to the Boone tank over a two-and-one-half-month period — October 9, 1970 to December 18, 1970. The deputy's testimony was that an appropriate usage for that period would be nearer 1,200 gallons.

The evidence that the overbilling scheme was the result of a criminal conspiracy between Tucci and Torres, although circumstantial, was abundant. An employee of the Main Oil Company testified that normally all credit delivery invoices for customers of the company would be placed in the cash box daily by an individual making the delivery. They would then be posted on the respective ledger account the following day. However, all delivery

invoices to the Sheriff's Department would be handled exclusively by John Tucci, although he made none of the deliveries. Not infrequently, this employee observed several such invoices on Tucci's desk made out to the Sheriff's Department account. These invoices were unsigned. However, at some later date these invoices would reappear for late posting on the ledger account bearing Joe Torres' signature. Torres admitted the signatures were genuine. Thus, the inference was inescapable that Tucci personally and surreptitiously delivered these invoices to Torres for the latter's signature. Most of these invoices were concededly fraudulent.

However, this was not Torres' major contribution to the fraud. The Pueblo County clerk testified that the County would not pay any of these overbillings absent a requisition to do so by the Sheriff's Department. All the requisitions for payment of these fraudulent overbillings were personally verified as legitimately due by Torres. Most of the individual invoices reflecting deliveries of gasoline, also contained in the Pueblo County records, were personally receipted by Torres. Seven of the nine invoices relating to the Boone, Colorado, "deliveries" were receipted by Torres. One other is signed by "JT." Six of the eight invoices of the gasoline and miscellaneous petroleum products "delivered" to the main Sheriff's office bore Torres' signature. Without this continuing assistance, the bills never would have been paid.

Torres admitted signing these documents and admitted that Tucci bilked the Sheriff's Department. Although Torres testified that his participation was unwitting, the evidence belied Torres' assertion of innocence.

As to the grossly inflated, and admittedly fraudulently billed, deliveries in May of 1970 to the tank located in downtown Pueblo, Torres asserted mere oversight. Yet he

testified that he knew the number of vehicles being serviced by that tank, he knew the appproximate mileage these vehicles got, and he knew that the use was constant from month to month. His continuing assertion that he innocently authorized inflated payments was also significantly controverted by his admission that he had been checking gasoline usage from that tank immediately preceding this period of time because he suspected unauthorized usage of the gasoline by the County Commissioners and by the County Clerk. Torres also acknowledged adverse newspaper publicity concerning the excessive gasoline usage during the latter part of July 1970. Suspiciously and coincidentally, billings for gasoline deliveries immediately dropped during the month of August to approximately one-fourth of that supposedly used in May. Yet the need for gasoline remained constant throughout these months.

There was also compelling evidence discrediting Torres' claim that he innocently erred each time he signed an invoice reflecting a patently impossible delivery of gasoline to the tank in Boone, Colorado, and each time he compounded such "error" by signing a requisition for payment for an inflated amount. Torres established the auxiliary tank in Boone. He admitted that he generally knew the amount of gasoline the deputy there had used. He also failed to deny that he had previously told a Colorado Bureau of Investigation agent that he knew that the tank in Boone held only 500 gallons. Instead, he merely claimed that he couldn't remember that conversation. Armed with knowledge of the gasoline usage in Boone, and possibly armed with knowledge of the capacity of the tank he had ordered installed, Torres personally approved many deliveries in excess of that capacity and far in excess of the periodic usage. He also testified that he read all the tickets he signed. It is also significant that Torres did not allow the Boone station deputy to sign a receipt for

the Boone deliveries or keep records of what was delivered. All these facts circumstantially demonstrated that Torres knowingly assisted in defrauding Pueblo County.

The above cited evidence is totally independent of the notes and records, personally kept by John Tucci, the coconspirator. It is the evidentiary use of these notes and records upon which this petitioner claims error and predicates this petition for certiorari. These notes and records (which the Colorado Court of Appeals found were made during the course, and in furtherance, of the conspiracy), in the opinion of an expert witness, reflected the amounts of overbillings to Pueblo County. Since the overbillings would necessarily create an inventory overage, Tucci hid the surplusage by delivering like amounts for cash to a gas station he owned, pulling the invoice from the Main Oil Company books, and pocketing the cash. The disputed notes and records (including the invoices of the deliveries to the gas station) primarily reflected this procedure.

Tucci was not called as a witness, although the Colorado Court of Appeals, repeating the observation of the trial court, noted that he was available to the defense. Rather the exhibits themselves were introduced. An expert accountant collated and explained the accounting procedure employed.

The disputed evidence was used before Torres testified. It was primarily used to further demonstrate the existence of the fraud and Tucci's participation therein. Torres did not deny Tucci's guilt. However, the disputed records also included notations of disbursements of the excess cash resulting from these thefts. The disbursement column on one exhibit reflected three payments to "Tores" [*sic*] in November and December of 1970. Specifically, those three notations constitute the damaging

materials that the petitioner now argues should have been constitutionally suppressed.

ARGUMENT

Contrary to the petitioner's present assertion, the Colorado Court of Appeals found that the evidence, independent of the coconspirator's notes and records, although circumstantial, established the prima facie existence of the conspiracy and Torres' participation therein. *People v. Torres,* 536 P.2d 868, 871 (Colo. App. 1975); *cf. Holland v United States,* 348 U.S. 121 (1954). The above recited evidence, all of which is reflected in the reported opinion, verified this premise. The Colorado Court of Appeals then employed the existing Colorado rule that a coconspirator's "statements," made in furtherance of and during the conspiracy, are admissible as an exception to the hearsay rule if the conspiracy is first independently established. *People v. Braly,* 532 P.2d 325, 327 (Colo. 1975); *People v Schlepp,* 518 P.2d 824 (Colo. 1974).

The petitioner now asserts, as the single issue for review, that employment of the Colorado rule in these circumstances violates his Sixth Amendment right to confrontation which is made obligatory on the states by the Fourteenth Amendment.

The respondent disagrees. This Court's decision in *Dutton v. Evans,* 400 U.S. 74 (1970), is adversely dispositive of the argument the petitioner now advances. Citing *California v. Green,* 399 U.S. 149 (1970), this Court, in *Dutton,* noted first that the constitutional right to confrontation does not automatically preclude the evidentiary use of all forms of hearsay evidence. Rather, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process . . . ." *Dutton v. Evans, supra* at 89. Thus the relevant inquiry in balancing hearsay evidence against the Confrontation

Clause is whether there are sufficient "indicia of reliability" of the particular hearsay offered so that the truth of the matter is not inherently suspect.

The present case does not involve a confession obtained by official interrogation; it does not involve prosecutorial misconduct resulting in a key witness being unavailable to the defense; nor does it involve the use of a paper transcript. It does not involve a joint trial or the wholesale denial of cross-examination. Indeed, the present petitioner was able to examine the notes and records here used and extensively cross-examine the expert accountant who collated and explained these exhibits. He was free to present evidence establishing a different interpretation (if one was logically possible) or to directly subpoena the source of the hearsay evidence. See *id.* at 88 n.19. He chose not to do so, and his inaction indicates the accuracy of the disputed evidence.

Unlike *Dutton,* this case does involve, however, application of the uniformly accepted coconspirator exception to the hearsay rule employed not only in Colorado but also in the federal courts. See *Krulewitch v. United States,* 336 U.S. 440 (1949); *United States v. Talbot,* 470 F.2d 158 (6th Cir. 1972). Since the fraudulent records here were made during the course, and in furtherance, of the conspiracy, were ultimately against the penal interest of the maker, and were allowed into evidence only after the prosecution had established by independent proof a concert of action between the petitioner and his coconspirator, the records have sufficient presumptive reliability to allow their evidentiary use without attendant confrontation. *Hitchman Coal and Coke Co. v. Mitchell,* 245 U.S. 229, 249 (1917). The independent-proof requirement is a substantive safeguard of the reliability of the coconspirator's "statement."

Furthermore, Tucci's "statements" were reduced to writing in the form of business records. As noted by Justice Harlan in his concurring opinion in *Dutton v. Evans, supra* at 95-96, the Confrontation Clause has never required the production of the maker of such records where, as here, the records are properly authenticated. This rule is a recognition that the necessary accuracy in a business endeavor insures the truth of the matters recorded. And "[t]he principles of efficient accounting apply just as readily to an illicit enterprise as they do in a licit business." *United States v. Baxter,* 492 F.2d 150, 164 (9th Cir. 1973).

Finally, as in *Dutton,* it should be observed that the source of the hearsay records, John Tucci, had personal knowledge of the matters he recorded. This was established by independent evidence and by the coconspirator's "guilty" plea in a separate proceeding (Appendix G of Petition). It was also tacitly admitted by the petitioner at his trial. Thus, it is inconceivable that cross-examination of Tucci would have revealed the latter's lack of knowledge of Torres' involvement or revealed a misrepresentation of the nature of that involvement. *Dutton v. Evans, supra* at 88-89. In fact, the contrary is true. All the factors that contribute to reliability found dispositive in *Dutton* are present here. Additionally, here the hearsay documents were made during the conspiracy, not after its completion. Here, the disputed evidence constituted business records, and the accuracy of the entries was necessary to perpetrate the fraud. And here, the petitioner, by testimony, admitted the primary conclusion offered by this evidence — that Tucci was defrauding the County of Pueblo.

CONCLUSION

Thus, the respondent respectfully submits that this petition for a writ of certiorari represents only the veiled hope

that this Court will hold that the Confrontation Clause prohibits the use of all hearsay evidence in a criminal trial. Because this evidence was admitted only after satisfactory bases to evaluate the truth of the matter presented were independently established, such a conclusion would be necessary to afford the petitioner the relief he requests. Accordingly, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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